No. 392

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Plaintiff in Error,

vs.

J. K. DUBOIS, as Administrator of the Estate of EDWARD JAY CURTIS, Deceased,
Defendant in Error.

Closing Brief of Plaintiff in Error.

I. B. L. BRANDT,
Of Counsel for Plaintiff in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Plaintiff in Error,

vs.

J. K. DU BOIS, As Administrator of the Estate of Edward J. Curtis, Deceased,

Defendant in Error.

Closing Brief of Plaintiff in Error.

Since the filing of the opening brief herein on behalf of the plaintiff in error, my attention has been called by the general counsel of the company to the fact that the Act which the Court below held applicable to the plaintiff in error, and as requiring it to give thirty days notice of the falling due of an of assessment, was repealed by the Legislature of New York in 1892, and therefore, was not in force at the time of the death of the insured, December 29, 1895.

I was not called into this litigation until after the

trial of the case and the denial of the motion for a new trial, and, therefore, naturally fell into the belief that the Act which the trial court applied to the policy was still in force. The General Counsel for the company, however, having informed me of my mistake, it is of course my duty to bring the fact of the repeal to the attention of the Court.

Before referring to the repealing Act, however, it may be stated that the latter simply adds force to and makes clearer what is said in the opening brief.

By an Act of May 18, 1892, now known as Chapter 38 of the General Laws of New York, the Legislature of that State declared that such new Act "shall be applicable to all corporations authorized by law to make insurance," and repealed all prior laws relating to insurance companies, including the Act of 1876, as amended in 1877, under which the Court below held the notice of the falling due of assessment No. 68 insufficient, and the Act of 1883 relied upon by plaintiff in error.

2 Revised Statutes of New York, (9th Ed.) p. 1131, sec. 1 and p. 1243, sec. 290.

Article II of the said Act is entitled "*Life*, *Health* or *Casualty* Insurance Companies" while Article VI thereof is entitled "Life or Casualty Corporations upon the *Co-operative or Assessment Plan*,"

Section 209 of the new Act which is found in Arcticle VI, declares: "Every corporation, company, society, organization or association of this or any other

State or country, *transacting the business of life* or casualty insurance upon the *co-operative or assessment plan*, as declared in this Article, including those heretofore organized with a capital stock and transacting such business, but not including any that shall hereafter be organized with a capital stock, *shall be subject to all the provisions of this article, and not* to the provisions of *Article II.*"

Id., p. 1216.

The Article to the provisions of which insurance companies doing business upon the co-operative or assessment plan are thus made subject is Article VI, which Article in Section 201 continues in force Section 5 of the Act of 1883, as amended in 1887, and in Section 210 continues in force, Section 17 of the said Act of 1883.

Id, pp. 1243, 1208, 1218.

Sections 201 and 210 of the Act now in force in New York, being identical with respectively Sections 5 and 17 of the Act of 1883, relied upon by plaintiff in error in its opening brief, the argument and authorities in the opening brief in reference to the Act of 1883, are equally applicable to Chapter VI of the Act of 1892; and plaintiff in error was subject only to said Article VI, and not to the provisions of Article II of said Act, and the notice given by it in this case being in compliance with said Article VI, was a good and sufficient notice.

In *Greenwald* v. *United Life Accident Association*, 42 New York, Supplement, 973, it was held that an insurance company doing business upon the assessment plan was required to give only the notice provided for by said Section 210 of the Act of 1892.

In *Bopple* v. *Supreme Tent of Knights of Maccabees*, 45 New York, Supplement, 1096, the Act of 1892 provided that fraternal societies should be subject to the provisions of Article VII of the Act only, and it was held that fraternal socities were not subject to the provisions of Article II, thus giving effect to the similar provision in relation to assessment companies that they shall be subject only to the provisions of Article VI.

So in *O'Grady* v. *New York Mutual Live Stock Ins. Co.*, 16 Appellate Division (N. Y.) 567, it was held that a co-operative live stock insurance company was subject only to the provisions of Article VIII of the said Act of 1892, that article dealing specifically with live stock insurance companies organized upon the assessment plan.

The Act of 1876, as amended in 1877, and under which the Court below held that thirty days notice of assessment No. 68 should have been given the insured, is contained in a modified form, in Section 92 of Article II of the said Act of 1892.

2 Revised Statutes of New York (9th ed) p. 1174.

But, as we have seen an insurance company doing business upon the corporative or assessment plan, is expressly declared by the Act of 1892, *not* to be subject to the provisions of said Article II.

Were the plaintiff in error, however, subject to the provisions of Article II, the notice of assessment No. 68 would have been a full compliance with the provisions of that Article, for the said article requires a notice of only 15 days to be given of an assessment.

The language of Section 92 is as follows: "No life insurance corporation doing business in this State shall declare forfeited or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract of one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest for installment, or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice, stating the amount of such premium, interest, installment or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address, postage paid by the corporation, or by an officer thereof, or persons

appointed by it to collect such premium, at least *fifteen* and not more than forty-five days prior to the the day when the same is payable."

The notice of assessment No. 68 was held by the Court below to be but a twenty-nine days' notice, but as the law of 1876, as amended in 1877, had been repealed, and the said Article II required but a fifteen days' notice it is evident that, under either Article VI or Article II of the Act of 1892, the notice was sufficient.

The inapplicability, however, of said Section 92 is evident upon its face.

1st. It has reference to only policies "hereafter issued or renewed."

2d. It specially excepts from the operation thereof "a term insurance contract for one year or less,"

3d. It speaks only of premium and installment policies, and carefully abstains from any mention of assessment policies which are especially dealt with in Article VI of the Act.

The policy in this case is either not a "hereafter issued or renewed" policy; or it is "a term insurance contract for one year or less, for it expressly provides that: "This contract on the part of the association is a *bi-montly term contract*, renewable at the option of the member before expiration. (Transcript p. 24). The policy is not a premium or installment policy.

I have been requested by the general counsel for the plaintiff in error to make a point, which, in view of the very evident unsoundness of the holding of the learned judge below as to the notice of assessment No. 68 being but a twenty-nine days' notice, I thought superfluous to refer to in my former brief, and which, in the light of the Act of 1892, only now brought to my attention, is beyond any question superfluous. Out of deference, however, to the learned counsel, and, at the same time, with a full appreciation of the strength of the point, I will briefly refer to it.

The provision of the Act of 1876, as amended in 1877, as to thirty days' notice, which the learned judge below thought was still in force, and, therefore, applicable to the policy in this case, immediately preceding the part thereof quoted at page 19 of the opening brief of plaintiff in error, provides: "Whenever any premiums or interest due upon any policy shall remain unpaid when due, a written or printed notice stating the amount of such premiums or interest due on such policy, the place where said premium or interest shall be paid, and the person to whom the same is payable shall be duly addressed and mailed to the person whose life is assured or the assignee of the policy, if notice of the assignment has been given the company, at his or her last known postoffice address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premiums. Such notice shall further state that

unless the said premium or interest then due shall be paid to the company or a duly appointed agent or other person authorized to collect such premiums within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made *within thirty days limited therefor*, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited as lapsed until the expiration of *thirty days* after the mailing of such notice."

Under this provision, even if it had been in force, the notice given by the plaintiff in error was sufficient for it was a notice requiring the payment of the premium within thirty days after the mailing of the notice.

The constitution and by-laws of the plaintiff in error, which form part of the certificate of insurance, provide that "on the *first week day* of the months of February, April, *June*, August, October and December of each year" an assessment shall be levied (Trans., p. 43), and that a failure to pay the assessment *within thirty days* from the *first week day* of February, April, *June*, August, October and December * * * shall forfeit his membership in this association, with all right thereunder, and the certifi-

cate of membership shall be null and void" (Id., p. 43).

Similar provisions are contained in the certificate itself. The policy is declared to be issued upon the condition of the payment of all mortuary premiums, payable at the home office of the association "*within thirty days from the first week day* of the months of February, April, *June*, August, October and December of each and every year." (Id., p. 15.) "*Within thirty days from the first week day* of February, April, *June* * * * of each year, * * * there shall be payable to the association a mortuary premium," etc. (Trans., pp. 16, 17.) "In the event of the non-receipt by a member of a mortuary premium notice on or before the first week day of February, April, June, * * * of each and every year, it shall be nevertheless a condition precedent to the continuance of this certificate or policy of insurance in force, that an amount equal at least to the amount of the next preceding mortuary premium paid shall be paid said association *within thirty days from the first week day* of February, April, *June* * * * of each and every year. Notice that a mortuary premium *is payable* to said association on the *first week day* of February, April, *June* * * * of each and every year is hereby given and accepted (Trans., pp. 20, 21).

These various provisions made the assessment or Mortuary Call No. 68 due June 1st, and allowed the insured thirty days thereafter within which to pay the

same, and as the notice of the assessment was mailed the insured on June 1st, and expressly notified him that: "The above Mortuary Call is *now due and payable*, and should be paid *at once*. If not paid on or before July 1, 1893 the policy will expire and become null and void;" (Trans. p. 55.) it results that the notice was clearly a notice sent after assessment No. 68 became due, and that the failure of the insured to pay the same within thirty days after June 1st, to-wit, on or before July 1st, caused the certificate to expire and become null and void.

In addition to the authorities cited on page 10 of plaintiff in error's opening brief to the point that the non-payment of assessment No. 68 within the time required for its payment, if notice thereof was properly given, or if notice thereof was not required, terminated the policy, a point, however, that apparently is not contested by respondent, I desire to call the attention of the Court to the following cases, which, being decisions of the New York Court of Appeals on provisions similar to those found in the policy in this case, are decisive of such point.

Rochner vs. *Knickerbocker Life Ins. Co.*, 63 N. Y. 160.

Evans vs. *United States Life Ins. Co.*, 64, *Id.* 304.

Robertson vs. *Metropolitan Life Ins. Co.* 88, *Id.* 541.

Attorney-General vs. *Continental Life Ins. Co.* 93, *Id.* 70.

Holly vs. *Metropolitan Life Ins. Co.* 105, *Id.* 437.
Fowler vs. *Metropolitan Life Ins. Co.* 116, *Id.* 389.
See also *New York Life Ins. Co.* vs. *Statham*, 93, U. S. 24.

As to the motion of defendant in error to dismiss and affirm.

I.

One of the grounds of this motion is that the bill of exceptions was not signed in time, because the trial was had at the December term of the court, and the signature of the Judge was not affixed thereto until after the expiration of that term.

But the rules of the Circuit Court for the Ninth District do not contemplate the signing or even presentation of a bill of exceptions at the same term at which a case is tried, and, on the contrary, provide for the presentation and signing of a bill after the expiration of the term

Rule 25 of the Court is as follows: "Where exceptions are taken, or there is a demurrer to evidence, the party shall not be required to prepare at the trial his bill of exceptions, or demurrer and statement of evidence, but shall merely reduce such exceptions to writing, or make a minute of the demurrer to the evidence, as the case may be, and deliver it to the Judge. The bill or demurrer shall, within ten days after the termi-

nation of the trial be drawn up, filed, and a copy be served on the attorney of the adverse party, who, within five days thereafter, may prepare, serve, and file amendments thereto; and in default thereof, the right to propose amendments shall be deemed waived, in which case, within five days thereafter, the proposed bill may be presented by the moving party to the Judge for allowance. If amendments are served and filed within the time allowed, they shall be deemed assented to by the party proposing the bill, and may in like time and manner, be presented to the Judge for allowance, unless the said party within three days after receiving a copy of such amendments, shall notify the opposing attorney of his dissent, and that at a time and place specified, not more than two nor more than five days distant, he will present the proposed bill and amendments to the Judge for settlement, and in that case the said bill shall be so presented," etc., etc.

This rule is substantially similar to the rule in *Chateaugay Ore and Iron Co., Petitioner*, 128 U. S. 544, under which it was held that a bill of exception need not be signed during the term at which the trial was had.

To the same effect are the cases of *Bank* vs. *Eldred*, 143 U. S. 293, 298, *United States* vs. *Jones*, 149, *Id.* 262 and *Missouri K. & T. Ry. Co.* vs. *Russell*, 60 Fed. Rep. 501.

The cases cited in the brief of defendant in error are cases in which there was no standing rule of the

Court regulating the presentation and settlement of bills of exceptions.

II.

The bill of exceptions in no way violates Rule 10 or any other rule of this Court, and is in all respects a proper one. The objections made to it are that it contains extraneous matter upon which no exception, objection or assignment of error is predicated. The objection is due to a misconception of counsel for defendant in error of the object of the bill of exceptions, which is to bring to this Court merely the point that the findings or agreed statement of facts do not justify the judgment. The bill does not seek to question any rulings of the Court in the course of the trial. The alleged extraneous matter is not pointed out, and Rule 10 of this Court has reference solely to charges of the Court to juries and has no application here.

III.

The object of the writ of error in this case is to bring before this Court the question whether the findings or agreed statement of facts justify the judgment. It is not necessary, in order to raise such question in this court that the plaintiff in error should have made an objection to the admission or rejection of evidence, or asked an instruction in the nature of a demurrer to the evidence.

The question whether the facts found or agreed

to justify the judgment is always before this court, on a writ of error, for error apparent on the face of the record need not be presented by a bill of exceptions.

Young v. *Martin*, 8 Wall., 354, 357; *Moline Plow Co.* v. *Webb*, 141 U. S., 616, 623; *Washington R. R. Co.* v. *Coeur D'Alene Ry. Co.*, 15 U. S. Ap., 359, 366.

The assignment of errors specifies that the Court erred in ordering judgment for the plaintiff in the action and also in not ordering judgment for the defendant therein. These two questions are the only questions before this court, and being properly before it, are to be determined.

As stated, it is not necessary, in order that a writ of error shall bring before this Court the question of the sufficiency of the findings or agreed statement of facts to justify the judgment, that an objection of any kind should have been made in the lower court.

IV.

Reply to Brief of Defendant in Error.

The answer of the plaintiff in error alleges that at all the times mentioned in the complaint it was a corporation, existing and doing business under certain laws of the State of New York. That it was and is an insurance corporation is admitted. That it was doing business upon the assessment plan appears conclusively from the certificate of insurance, which is annexed to and made part of the complaint, and the very question before the Court below was

whether or not the certificate had lapsed for failure of the insured to pay an assessment levied upon him. Under what laws it was doing business is a question of law to be determined upon an examination of the laws of New York, and the ascertainment thereby of what laws apply to a corporation doing business upon the assessment plan. Such an examination of the laws of New York shows that prior to the repealing Act of 1892, the plaintiff in error was subject to and governed by the Act of 1883, and that since the enactment of the statute of 1892 it has been and is subject to said last mentioned statute.

Section 700 of the Revised Statutes provides that in a civil cause tried by the Court without a jury, "when the finding is special the review may extend to the determination of the sufficiency of the facts to support the judgment."

In this case a jury was waived by agreement of the parties, and the case submitted to the Court upon an agreed statement of facts.

A case may be submitted to the Court upon an agreed statement of facts, and such statement will take the place of a special finding, and in such case it is unnecessary that there shall be any bill of exceptions in order to enable this Court to review the same on a writ of error.

Stimpson vs. *Baltimore & Susquehanna R. R. Co.*, 10 How. 328, 345–7.

Graham vs. *Bayne*, 18 *Id.* 60, 62.

Guild vs. *Frontin*, *Id.* 135.

Campbell vs. *Boyreax*, 21 *Id.* 223, 226.
England vs. *Gebhardt*, 112 U. S. 502, 505.
Rogers vs. *United States*, 141 *Id.* 548, 554.

An agreed statement of facts is equivalent to a special verdict, and presents questions of law for the consideration of the Appellate Court, and such Court has authority to determine, as in the case of a special verdict, whether the facts set forth in such statement are sufficient in law to support the judgment, although the finding of the Circuit Court on them be in form generally.

Supervisors vs. *Kennicott*, 103, U. S. 554.

Where a jury is waived, and the case is tried by the Court, the Court's finding of facts, whether general or special, has the same effect as the verdict of a jury, and although a bill of exceptions is the only way of presenting rulings made in the progress of the trial, the question whether the facts set forth in a special finding of the Court, which is equivalent to a special verdict, are sufficient in law to support the judgment may be reviewed on a writ of error without any bill of exceptions.

Allen vs. *St. Louis Bank*, 120 U. S. 20, 30.

Where the Court below makes special findings, (or what is the same thing, when there is an agreed statement of facts), no exception is necessary to raise the question whether the facts support the judgment.

Seerberger vs. *Schlesinger*, 152 U. S. 581.
Jennisons vs. *Leonard*, 21 Wall. 302, 307.

As we have shown, supra, however, the question

whether the facts found support the judgment, is always before this Court on writ of error.

It is suggested by counsel for defendant in error, that the agreed statement of facts is not the equivalent of a special finding because an affidavit forms part of it. The cases cited in support of the proposition, however, are not in point. All they decide is that a mere statement or recapitulation of the evidence, which requires the Court to weigh the evidence, cannot be regarded as an agreed statement of facts. The agreed statement of facts in this case is not a statement or recapitulation of evidence, and does not require the Court to weigh conflicting statements. It sets out specifically certain facts as facts in the case, and provides that the affidavit of B. W. F. Amsden "shall constitute a part of this agreed statement of facts." The affidavit in question is itself a mere statement of additional facts, stated as clearly and tersely, and in the same manner, as said facts would appear in the agreed statement, if specifically set forth therein, and forms part of the statement in exactly the same manner as if the facts therein set forth were specifically set forth in the statement. That an affidavit may form part of an agreed statement of facts is declared in *Baltimore and Potomac R. R. Co.* vs. *Trustees*, 91 U. S., 127, 130.

No evidence was introduced by the defendant in error, nor was there anything in the agreed statement, to show that the Act of New York of 1876, as amended in 1877, applied to the plaintiff in error. The Court below, however, took judicial notice of the laws

of New York and applied to the plaintiff in error the law of that State that appeared to it to govern plaintiff in error. It is now said by counsel for defendant in error that it is too late for the plaintiff in error to raise the question of the inapplicability to it of said law. The plaintiff in error has never claimed that it was subject to the Act of 1876, as amended in 1877, and, while the agreed statement of facts shows that the notice sent the insured of assessment No. 68 fully met all the requirements of that law, the plaintiff in error in no way estopped itself from claiming that said law did not apply to it. As a matter of law, even if the parties had agreed in the statements of facts that the Act of 1876 as amended in 1877, controlled the certificate in this case, they would not be bound by such statements, for the question of what law governed the certificate was one of law to be determined by the Court by taking judicial notice of the laws of New York. And this Court, on the hearing of the writ of error, likewise takes judicial notice of the laws of New York, and determines from its knowledge derived in such way what particular laws of that State govern the plaintiff in error.

In *Fourth National Bank* vs. *Franklyn*, 120 U. S., 747, 751, the case was tried in the U. S. Circuit Court for the Southern District of N. Y. The suit was to determine a stockholder's liability to a creditor of a corporation, arising under the laws of the State of Rhode Island, and was heard upon an agreed statement of facts in which the parties set forth that the corpora-

tion was subject to certain laws of Rhode Island, which laws appeared at length in the statement.

On writ of error to the Supreme Court of the United States, it was held that the plaintiff in error was not bound by the agreed statement, and that the Court would take judicial notice that said laws had been repealed.

Court: "In the Court below, statutes and decisions of Rhode Island were agreed or proved and found as facts, in seeming forgetfulness of the settled rule that the Circuit Court of the United States, as well as this Court on appeal or error from that Court, takes judicial notice of the laws of every State of the Union. *Hawley* vs. *Donoghue*, 116 U. S., 1, 6, and cases there collected. No reference was made to the statute of 1877 c 600, to which the plaintiff has now referred, and which repeals and modifies in some respects the statutes agreed and found on the record to be still in force, and it is contended for the defendant that this Court should not reverse a judgment on a ground which was not presented to the court below. This is doubtless the general rule, but it would be unreasonable to apply it when the effect would be to make the rights of the parties depend upon a statute which, as we know and are judicially bound to know, is not the statute that governs the case."

In *Lamar* v. *Micou*, 114 U. S., 218, 223, it was declared: "The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the Courts of the United States are

bound to take judicial notice, without plea or proof."

In *Hawley* v. *Donoghue*, 116 U. S., 1, 6, it was said: "When exercising an original jurisdiction under the constitution and laws of the United States, this court, as well as every other court of the National Government, doubtless takes notice without proof, of the laws of each of the United States. But in this Court exercising an appellate jurisdiction, whatever was matter of law in the Court appealed from is matter of law here, and whatever was matter of fact in the Court appealed from is matter of fact here. In the exercise of its general appellate jurisdiction from a lower court of the United States, this Court takes judicial notice of the laws of every State of the Union, because those laws are known to the Court as laws alone, needing no averment or proof."

The public laws of a State may be read in the appellate court, *Leland* v. *Wilkinson*, 16 Peters, 317, 321, 322.

I am unable to find anything in *City of Findlay* v. *Pertz*, 20 C. C. A., 662, cited by counsel for defendant in error that has any bearing upon this question.

As to the inapplicability to plaintiff in error of the laws of New York of 1876, as amended in 1877, it is unnecessary for me to make a special reply to the brief of defendant in error, as the point is fully covered by my opening brief and the first part of the present brief.

The case of *Jacklin* v. *National Life Assn.*, 24 N. Y., Supplement, 746, is the decision of an inferior court

of New York, and, of course, cannot be said to overrule *Ronald* v. *Mutual Reserve Fund Life Assn.*, decided by the Court of Appeals of New York, in which the Court of Appeals expressly decided that the Act of 1876, as amended in 1877, did not apply to plaintiff in error.

In the case of *McDougal* vs. *Provident Life Savings Assoc.* likewise cited by counsel for defendant in error the question argued was simply whether the Act of 1876, as amended in 1877, applied to a policy of insurance which was required to be renewed each year by the payment of an annual premium, and the Court stated that it was unnecessary to determine the question, as the appeal would be decided on another point.

It is said that the notice of assessment 68 did not comply with the provisions of the Act of 1876, as amended in 1877, because it required the payment of the assessment within thirty days from the date of the notice, while the Act provides for the payment within a certain time after the mailing of the notice. Assuming the Act in question to be applicable to the plaintiff in error, and that the notice given was a notice before the assessment was due, the notice fully met the requirements of the Act. The notice was mailed on June 1st, and was dated June 1st, so that when it required payment within thirty days from the "date of this notice," it called for payment within thirty days from "the mailing of said notice" for the two dates were the same. The said Act does not declare that the notice shall be in any particular

form, but only that it shall require the payment of the assessment within thirty days from the date on which the notice is mailed. The notice in question did require the payment to be made within thirty days from a date, which was the date on which the notice was mailed.

In *McDougall* vs. *Provident Savings Life Assurance Society*, 135 N. Y. 551, 555, referred to supra, the notice of the yearly premium stated that the premium would be due and payable July 23, 1888, and that it must be paid "on or before the date above mentioned." No mention was made in the notice of the day of mailing, and it was held that the notice fully met the requirements of the said Act of 1876, as amended in 1877. Speaking of the notice and the case of *Phelan* vs *Northwestern Life Insurance Company*, 113 N. Y. 147, cited in the brief of defendant in error, the Court there say: "This notice would seem to be very definite in its statement; but the respondents say, and the Court below has thought, that it is not in conformity with the provisions of the statute for not literally following the statutory language. In support of this they cite *Phelan* vs. *Northwestern Mutual Life Insurance Co.*, (113 N. Y. 14) where this Court held a notice insufficient. The notice there was that 'the conditions of your policy are that payment must be made on or before the day the premium is due and members neglecting so to pay are carrying their own risk,' and what was condemned was the use of language not intelligible to all. To say that persons are 'carrying

their own risk' is not plainly embodying the notice which the statute requires and might be incomprehensible to those unlearned in insurance phraseology. * * * The statute was not meant to operate harshly upon the insurer, but to afford a protection to the assured by the reasonable requirement of a notice, couched in plain terms from the insurer, before the interest of the insured could be forfeited. To hold that where every essential fact required to be known is intelligibly stated in the notice, it may be disregarded, if not literally following the work of the statutory provision, would be a most harsh and unwarrantable construction."

The assessment as shown *supra*, was clearly due and payable on June 1, 1893, and the insured had thirty days of grace thereafter, under the certificate, during which he might make the payment. The statement in the answer that the assessment became due and payable July 1, 1893 is a clerical error.

Amsden, in his affidavit, states, transcript, p. 51, that notice of the assessment enclosed in a sealed envelope, properly addressed, and stamped, was deposited "in the general postoffice in the City of New York by this deponent at 5 o'clock in the afternoon of the 1st day of June, 1893." There is nothing hearsay about this, and if it were hearsay, that fact would make no difference, because the facts stated in the affidavit form part of the agreed statement of facts.

At the close of his brief counsel for defendant finally refers to the point upon which the lower court based its decision, namely, that the notice of assessment No. 68 was not a thirty days' notice. In support of the decision counsel for defendant in error cites but a single case, *Hicks* v. *National Life Ins. Co.*, 60 Fed., 690, and instead of attempting to show the soundness of that decision, pleads that it be followed, because otherwise this Court "must overrule the above Court construing the statute of its own circuit." This Court will certainly not follow a decision which has not a single case in its support, and which is opposed by such a vast current of authorities as is cited in the opening brief for plaintiff in error.

Were the Court inclined, however, to follow that case, it would be unable to do so, for the certificate is required to be construed according to the laws of New York, and, under those laws, the notice was clearly a thirty days' notice.

Upon the agreed statement of facts the plaintiff in error is clearly entitled to a judgment that the plaintiff in the action take nothing, and it is respectfully submitted that the judgment should be reversed, with directions to the court below to enter judgment in favor of the defendant in the action, the plaintiff in error here.

I. B. L. BRANDT,

Of Counsel for Plaintiff in Error.